ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION IV

CA05-1380

September 20, 2006

APPEAL FROM THE BENTON COUNTY CIRCUIT COURT
[DR00-1676-4]

SAMUEL HARMON
APPELLANT

V.

HONORABLE JOHN R. SCOTT, JUDGE

KELLI HARMON MARENIC
APPELLEE

AFFIRMED

Samuel Harmon appeals the order changing the primary custody of his two minor daughters from him to his ex-wife, Kelli Marenic. On appeal, he argues that the trial court's decision that appellee had shown by a preponderance of the evidence that there had been a material change in circumstances since entry of the original decree is clearly erroneous; that the trial court's decision that it was in his daughters' best interests to be moved to Shreveport, Louisiana, is not supported by the evidence and therefore is clearly erroneous; and that the trial court's reliance upon pleadings and affidavits filed in a dismissed guardianship proceeding requires reversal. We affirm.

In October 2000, the parties, in contemplation of divorce, entered into a property-settlement, child-custody, and child-support agreement, in which appellee agreed to give primary custody of the parties' daughters to appellant, subject to her right of visitation. The agreement was incorporated into the parties' divorce decree.

In early 2004, appellant's parents, Roy and Kathy Harmon, filed a petition for guardianship of their granddaughters. Appellant signed a consent agreeing to allow his parents to be appointed the girls' guardians, but appellee refused to sign a consent. Appellee then filed a petition for change of custody on June 25, 2004. An order to dismiss the guardianship petition was filed on July 6, 2004.

At the hearing on appellee's petition for change of custody, appellee testified that she and appellant were divorced in 2000; she remarried in 2001 to her current husband, Tim Marenic; they currently resided in Shreveport, Louisiana; Marenic was an officer in the Air Force; and she did not work. She explained that, at the time of their divorce, she agreed for appellant to have custody of their daughters because she was not working; she could not take care of herself; and she thought that appellant could take care of the girls. She stated that she was now stable and better able to take care of the girls. She said that she visited the girls as much as possible but that it was difficult because of living out of state; she said that appellant had never refused her visitation, but that he had not made any allowances in visitation due to the fact that she lived out of state. Appellee stated that she knew appellant loved the girls but that her home, a four-bedroom, two-bath house

with a fenced back yard, would be better for them; and it was just a feeling that she did not know how to explain.

Appellee testified that appellant worked for his parents in their drilling business, and that it was her understanding that appellant's parents were the girls' primary caretakers. She said that appellant and the girls had resided with appellant's parents for most of the time since the divorce. She said that appellant had remarried and had another child and she did not want to take the girls away from their half-sister, but that appellant had divorced again and the younger child did not live with him so that was no longer an issue. Appellee also stated that there was heavy smoking in appellant's parents' house that irritated one of her daughter's eczema.

Appellee said that she was asked to sign "guardianship papers" for the girls for the stated purpose of obtaining health insurance through appellant's father; she refused to sign anything; but appellant did give consent to the guardianship because, according to the paperwork, he was unable to care for the girls. Appellee said that she filed her petition for change of custody in response to being asked to sign the papers allowing appellant's parents to obtain a guardianship. She testified that the guardianship petition stated that the girls lived with their paternal grandparents and that appellant had moved out of the house. She confirmed that to her knowledge, appellant had been out of his parents' house for a "few months." Appellee told the trial court that if she was granted custody, she would be a stay-at-home mom; she would pick the girls up from school; she

would provide for them financially; and she would provide the girls with medical insurance.

On cross-examination, appellee admitted that her relationship with Marenic began before she was divorced from appellant and that she agreed to give custody of the girls to appellant at the time of the divorce. She testified that Marenic was subject to being moved in a year due to his job, and that his job could require him to leave at any time. She agreed that since the divorce the girls had lived in the same area, but not in the same home, having moved from a separate residence into appellant's parents' home several months after the divorce. She further agreed that appellant was the person who was in charge of the children. Appellee admitted that the guardianship, which she said was explained to her as a way to get insurance for the girls, never happened.

On redirect examination of appellee, the waiver of notice and consent to guardianship of his daughters signed by appellant in the action brought by his parents was admitted into evidence without objection. The consent provided, in pertinent part:

> The above named minors are living with their paternal grandparents, Roy Harmon and Kathy Harmon at 126 Old Wire Road in Lowell, Arkansas. They have resided with them from time to time since their birth, and have continuously resided with them since July of 2003. This residency is with my knowledge and permission.
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> At the present time I am unable to provide the stable care that the minors obtain while living with their grandparents, and am therefore not able to act as their guardian. I believe that a guardianship of the person and estate for [the minor children] by Roy Harmon and Kathy Harmon is in the best interests of the minors, and I hereby voluntarily grant my consent to such guardianship.

The consent was signed by appellant and was notarized.

Tim Marenic, appellee's husband, testified that he was a lieutenant in the Air Force and had been married to appellee for almost three years. He explained that when they lived in Fayetteville, they got the girls almost every other weekend; that when they moved to Texas for his training it was more difficult to visit the girls because they only had one car, but as often as he could obtain leave time, they would make the eight-hour drive to see the girls. Marenic said that he would be in Shreveport for another year, at which time he would decide whether to remain in the military; he stated that he would likely reenlist, meaning there would be a chance that he would be moved. He also said that he and appellee were looking at purchasing a second car and that if the trial court awarded appellee custody, she would drive him to work and have the car to take the girls to school. Appellant testified that when he signed the consent for his parents to obtain guardianship of the girls, he was a CNA at a Fayetteville nursing home; that he would work the 3-11 and 11-7 shifts; and that his parents took care of the girls while he was working. He also said that he was trying to get into nursing school, and that he would not be making the amount of money he needed to support the girls while in school. He testified that he had an apartment, which would give him a place to study, and that the girls resided with him except for during the week, when they stayed with his parents so that his older daughter could go to school in Lowell and get off the bus at his parents' house. He said that he would usually stay at the apartment with the girls on Friday and Saturday nights, and that when the girls stayed with his parents, he would go back to his parents' house after he got off work.

Appellant admitted that at the time he signed the consent for guardianship, he was living at his parents' house and they were helping him financially so that his earnings could be used for nursing school, but that he was taking care of the girls at that time, and there was nothing keeping him from being able to take care of the girls presently. Appellant testified that he never went through with the guardianship, but that if it had been granted, he would have continued to live with his parents and would have kept the apartment for his studies. He said that they were going to "turn it all around to where [he] had full custody again" after he had received his nursing license. However, appellant said that he was no longer working at the nursing home or trying to go to nursing school; that he had changed his mind about nursing school when appellee filed her petition for custody; and that he was trying to get his own tree service started and was working for his father and uncle in the drilling business from time to time as a licensed driller and pump installer.

On cross-examination, appellant reiterated that the girls had stayed at his parents' house during the week when he had the apartment and that his mother took care of them while he worked eight to ten hours per day. He said that prior to the guardianship petition, he worked nights at the nursing home and his hours were varied, but he now only works during the day and does not work on the weekends. He said that at the time he signed the consent for guardianship, he believed that his parents were better able to take care of the girls financially, and that if it were not for his parents, he would be in "a world of trouble."

Roy Harmon, appellant's father, testified that he had "everything" to do with the guardianship and that appellant was reluctant to go along with it because he was not going to give his kids to anyone; he said that appellant finally agreed to go along with the guardianship if appellee would agree to it. Roy Harmon stated that appellee and her husband agreed to the guardianship, but that after it was prepared, appellee refused to sign the consent so they "just dropped it." He said that appellant takes care of the kids constantly and that he and his wife assist him.

On cross-examination, Roy Harmon stated that he dropped the guardianship when appellee would not consent to it, and that he was pretty sure that the guardianship petition was dismissed before appellee petitioned for a change of custody. He denied seeking guardianship for tax purposes, stating that he did it because it would help the girls.

Kathy Harmon, appellant's mother, testified that she was involved in the care of the girls to some extent, but that she just enforced appellant's rules and that appellant was the person raising the kids. She testified that appellant and the girls were living with her and her husband at the time the guardianship petition was filed, and that she and her husband "kind of pushed" appellant into signing the consent for guardianship. She said that the guardianship papers were not filed because appellant was not taking care of the children, but because she and her husband thought that the guardianship would give appellant more time for his studies without having to worry about the girls all of the time.

After appellant rested, the trial court determined that there had been a material change in circumstances and that it was in the best interests of the children for primary

custody to be vested in appellee, effective at the end of the school year. Appellant now appeals, arguing that there has been no material change in circumstances that warranted a change of custody; that it is not in the children's best interest to vest custody in appellee; and that the trial court improperly relied upon pleadings and affidavits from the guardianship proceedings, which had been dismissed.

In *Alphin v. Alphin*, 90 Ark. App. 71, 74-75, ___ S.W.3d ___, ___ (2005) (citations omitted), *aff'd*, *Alphin v. Alphin*, 364 Ark. 332, ___ S.W.3d ___ (2005), this court set forth its well-settled standards for a change in custody:

> Although the trial court retains continuing power over the matter of child custody after the initial award, the original decree is a final adjudication of the proper person to have care and custody of the child. Before that order can be changed, there must be proof of material facts which were unknown to the court at that time, or proof that the conditions have so materially changed as to warrant modification and that the best interest of the child requires it. The burden of proving such a change is on the party seeking the modification. The primary consideration is the best interest and welfare of the child, and all other considerations are secondary. Custody awards are not made or changed to punish or reward or gratify the desires of either parent.
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> In child-custody cases, we review the evidence de novo, but we do not reverse the findings of the trial court unless it is shown that they are clearly erroneous. A finding is clearly erroneous, when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. Because the question of whether the trial court's findings are clearly erroneous turns largely on the credibility of witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest. There are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carry as great a weight as those involving minor children.

We first address appellant's third point of appeal, that the trial court erroneously relied upon his consent for guardianship in a dismissed proceeding in order to determine

that a material change of circumstances warranting a change in custody had occurred, and that it was in the best interest of the children to change custody to appellee. His consent was entered into evidence without objection. In order to preserve an objection for appeal, a timely and appropriate objection must be made; when there is no objection, the argument that the evidence is inadmissible is not preserved for appeal. *Rodriguez v. Arkansas Dep't of Hum. Servs.*, 360 Ark. 180, ___ S.W.3d ___ (2004).

We next consider appellant's first argument, that the trial court's determination that there had been a material change in circumstances was clearly erroneous. We disagree. In his consent to allow his parents to pursue guardianship of the girls, appellant swore under oath that he was "unable to provide the stable care that the minors obtain while living with their grandparents, and [was] therefore not able to act as their guardian." The trial court was entitled to believe that the statements appellant made in his consent for guardianship were true. However, if this statement was false, as appellant contended in his testimony, then he lied under oath for the apparent purpose of obtaining insurance for the girls through his father. The morality of a parent is relevant to the best interest of the children and to the issue of parental custody. *Vo v. Vo*, 78 Ark. App. 134, 79 S.W.3d 388 (2002); *James v. James*, 29 Ark. App. 226, 780 S.W.2d 346 (1989). We cannot say that the trial court's determination that there was a material change in circumstances was clearly erroneous.

We finally address appellant's second argument that the trial court erred in finding that it was in the best interest of the children to change custody from him to appellee. If

the trial court believed the statements sworn to by appellant in his consent for guardianship were true, then clearly it was in the children's best interest for custody to be placed with appellee. Additional evidence in the record supporting the trial court's decision that it was in the best interest of the girls for appellee to be granted a change of custody was that appellant had moved in and out of his parents' house over a period of several years; that appellant admitted that he needed his parents' financial help to take care of the girls; that appellee would be a stay-at-home mother; and that appellee and her husband were able to support the girls. We cannot say that the trial court's determination that it was in the children's best interests to grant a change of custody to appellee was clearly erroneous.

Affirmed.

PITTMAN, C.J., and GLADWIN, J., agree.